United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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To Be Argued By
JOHN J. TIGUE, JR.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. LARRY JOHNSON,

PETITIONER-APPELLEE,

AGAINST

LEON J. VINCENT, SUPERINTENDENT OF GREEN HAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

RESPONDENT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLEE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. LARRY JOHNSON,

Petitioner-Appellee,

against

LEON J. VINCENT, Superintendent of Green Haven Correctional Facility, Stormville, New York,

Respondent-Appellant.

BRIEF FOR PETITIONER-APPELLEE

Preliminary Statement

The State of New York appeals from an order of the United States District Court for the Southern District of New York (Bauman, J.) dated January 30, 1974, granting a state prisoner's application for a writ of habeas corpus pursuant to Title 28, United States Code Section 2254 vacating his judgment of conviction and remanding him for re-sentencing nunc pro tunc to prosecute a new direct appeal to the Supreme Court of the State of New York, Appellate Division First Department. The District Court stayed its order pending the disposition of this appeal.

On December 11, 1969 appellee Larry Johnson and another (Boyce Thompson) were convicted of murder after a jury trial before Justice Charles G. Tierney of the Supreme Court of the State of New York, Bronx County. On January 23, 1970 Johnson was sentenced to a term of imprisonment of fifteen years to life.

The conviction was affirmed without opinion by the Appellate Division First Department on December 9, 1971. The New York Court of Appeals denied leave to appeal on January 25, 1972.

Statement of Facts

A. STATE COURT TRIAL

The state court trial record (PX-3)* indicates the following facts where adduced at trial:

On December 14, 1968 Johnson, Thompson, Perry Ford, Cecil Luckie and William Van Hook met one Nicholas Chambers in the Bronx. The six men then proceeded to the nearby apartment of Linda Mullins, Ford's common law wife. Ford's apartment had been burglarized and Mrs. Mullins, who apparently suspected Chambers, had recently told Ford that she had seen someone wearing a coat which she believed belonged to Ford. Ford, intending to have Mrs. Mullins verify the identification of Chambers as the possessor of his coat, brought him to her apartment where she did so identify Chambers.

Ford accused Chambers of the burglary and when he denied it he was thereupon beaten, principally by Ford although each of the others participated. When Chambers had been knocked somewhat unconscious, Van Hook and Luckie were told to go downstairs. While they were descending the stairs from the fourth floor apartment of a six story building, they saw Ford, Thompson and Johnson carrying Chambers up the next flight of stairs toward the roof. There was no proof in the

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* "PX" denotes Petitioner's Exhibit at the District Court hearing. "T." refers to the transcript of the minutes of the trial transcript. "Tr." refers to the transcript of the minutes of the District Court hearing. Numerical references with the suffix "a" are to the appendix.

State's case and it offered no eye witness testimony of what transpired on the roof. Mrs. Mullins testified that Ford returned to her apartment fifteen to twenty minutes later and informed her that he had just thrown Chambers off the roof. Luckie and Van Hook testified that they waited outside the building until Thompson came down and showed them Chambers' body lying in the alley. Thompson, testifying in his own defense, stated that as the four men reached the landing between the fourth and fifth floors, Johnson turned and went downstairs. When Thompson started to do the same, Ford pulled a gun and ordered him to continue upwards. On the roof, according to Thompson, Ford and Chambers started fighting and Ford punched Chambers and he fell off the roof.

Johnson's trial counsel took exception to the trial court's charge which dealt with the element of intent. The District Court found as a fact that Johnson's trial counsel requested a charge on the lesser included offense of assault. When the court refused to so charge, counsel excepted.* The jury found both defendants** guilty of murder in December 1969 and they were sentenced in January 1970.

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*The District Court found as a fact:

> "A fair reading of the colloquy between Court and counsel set out in the margin suggest that [trial counsel] did request a charge of assault and that the Court declined this request because it felt that the crime of assault 'merged' into that of murder." (52a)

**The original indictment named Johnson, Thompson and Ford. Immediately prior to the trial, Ford was severed from the

(footnote continued on following page)

B. POST TRIAL PROCEEDINGS

In November 1970, eleven months after his sentencing, Johnson moved for a new trial based on newly discovered evidence.* The motion was denied by Justice Tierney on November 9, 1971. The appeal from the denial of the new trial and the appeal from the judgment of conviction were heard together and were unanimously affirmed without opinion by the Appellate Division, First Department on December 9, 1971.** The New York Court of Appeals denied leave to appeal on January 25, 1972.

In August 1972, Johnson filed a second new trial motion pro se based on the same grounds asserted in the instant petition which was denied on September 6, 1972; a motion for reargument was denied September 13, 1972. The Appellate Division denied leave to appeal from these decisions.

(footnote continued from preceding page)

indictment having entered a plea of guilty with respect to another homicide and an armed robbery. The plea covered the Chambers murder as well. Ford was sentenced to twenty years in prison.

* The newly discovered evidence was a letter signed by Perry Ford stating that he caused Chamber's death and that Johnson was not on the roof when Chambers fell to his death. (PX-5, 6)

**People v. Johnson, 327 N.Y.S.2d 545 (1st Dep't 1971); People v. Johnson, 327 N.Y.S. 2d 546 (1st Dep't 1971).

C. UNITED STATES DISTRICT COURT PROCEEDINGS

On February 2, 1973 Johnson filed with the United States District Court for the Southern District of New York a petition for a writ of habeas corpus alleging in essence that he had been deprived on appeal of the effective assistance of counsel guaranteed by the Sixth Amendment and that at trial the prosecution supressed material required to be disclosed to defense counsel pursuant to Brady v. Maryland, 373 U.S. 83 (1963). The Court granted Johnson's motion to proceed in forma paperis, assigned counsel* and a two day hearing was held on September 28 and October 12, 1973.

1. PETITIONER'S CASE

At the hearing Johnson's appellate counsel, Lawrence P. Zamzok, Esq. ("appellate counsel"), Perry Ford, and Mary Lowe, Johnson's trial counsel, testified on behalf of Johnson. Zamzok testified to his background, education, experience in general and his lack of experience in the area of criminal law. During the course of Zamzok's testimony, petitioner introduced in evidence the two briefs prepared by Zamzok for the Appellate Division, First Department, his co-counsel's brief and the record on appeal. (PE 1, 2, 4 and 3, respectively).

At the time of his appointment, appellate counsel was 28 years of age. From his graduation from law school in

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* On September 10, 1973.

1964 to his appointment in 1970, appellate counsel engaged, virtually exclusively, in the practice of defending insurance companies in the area of personal injury litigation (Tr 3-5). Up to the date of his appointment, Mr. Zamzok never handled a murder case at trial or on appeal, nor had he ever tried a felony case. He handled only one felony case, an appeal (with perhaps one or two others) which dealt only with reviewing the harshness of a sentence after a guilty plea without a trial transcript, and not involving any points of law (Tr 4-6).

Appellate counsel permitted 18 months to expire from this date of his appointment until he argued petitioner's appeal in the Appellate Division (Tr 14). He perfected his appeal only after the Appellate Division ordered the appeal dismissed unless the appeal was perfected within a few months. The argument of the appeal took place almost two years from the date of petitioner's trial and just under three years from the date of his arrest. During the entire time Johnson, a teenager, was incarcerated for this crime alone (Tr 11).

When appellate counsel filed his brief before the Appellate Division, he failed to raise the issue of lesser included offense even though Johnson's trial counsel requested the charge and excepted to its denial. Appellate counsel testified that at the time of the appeal he was "not very

familiar" with the doctrine of a lesser included offense (Tr 13), that at the time he didn't "think [he] had an understanding" of the doctrine and had never heard of it at that time (Tr 14). When asked to explain why the issue was not raised on appeal he testified as follows:

> "Q: Can you tell his Honor why the issue of lesser included offense was not raised in this appeal?
>
> A: I missed it. I was not familiar with it and reading that did not alert me to it.
>
> Q: I gather you did no research in connection with that doctrine?
>
> A: No." (Tr 15)

Appellate counsel never filed a reply brief* on petitioner's appeal (Tr 15) and never spoke to Johnson's able trial counsel about petitioner's trial or appeal (Tr 17). Indeed, he never even met his client (Tr 4).

Ford testified in substance that prior to Johnson's trial Ford was brought to the office of the Assistant District Attorney in charge of the case where Ford disclosed to the prosecutor that Johnson was not on the roof at the time of the murder in question.

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* The brief appealing from the judgment of conviction was ten pages in length. Of these ten pages, three were devoted to a statement of facts, and another two were a verbatim transcription of Ford's letter, which had not been admitted in evidence at trail and was thus not properly before the Appellate Court. (PE 1, 2).

Petitioner called Johnson's trial counsel, now Judge Mary Lowe, of the Criminal Court of the City of New York, who testified to her trial preparation and the extent, or lack thereof, of her knowledge of Ford's contention that Johnson was not on the roof at the time Chambers fell to his death. Ford's attorney did not permit Judge Lowe to interview his client to verify any information she had.

2. RESPONDENT'S CASE

Respondent called only one witness, Irwin J. Goldsmith, Esq., the Assistant District Attorney in charge of the Johnson case. Goldsmith flatly denied the testimony of Ford and stated unequivocally that he never talked to Ford outside of the presence of his counsel and that Ford never told him that Johnson was not on the roof at the time of the murder.

3. DISTRICT COURT'S FINDINGS

The District Court found Goldsmith's testimony to be "honestly given" and "fully credible". The Court further found that no meeting ever took place between Ford and Goldsmith and that the prosecution withheld no exculpatory evidence in violation of its obligations under Brady.

The Court found that Johnson's representation on appeal was so inept as to deprive him of the effective assistance of counsel, in violation of his Sixth Amendment rights (58a).

POINT I

JOHNSON WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AND WAS SEVERLY PREJUDICED THEREBY

The State contends that Johnson was not prejudiced by his being deprived of the effective assistance of counsel because the issue of lesser included offense was without merit and had it been raised by his appellate counsel, it would have been to no avail. The contention is baseless.

The Constitutional right of an indigent defendant to the effective assistance of court appointed counsel "at every step of the proceeding" is well recognized. Powell v. Alabama, 287 U.S.45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Scobie v. Oklahoma, 239 F.Supp. 646 (D. C. Okla. 1965). It is equally well established that a state prisoner's claim

of ineffective counsel is cognizable in federal habeas corpus petitions particularly when, as here, a substantial defense was available to counsel and not raised.*

The existing standard to be applied in this Circuit in cases alleging inadequate counsel was first established in United States v. Wight, 176 F.2d 376 (2d Cir. 1949), cert denied, 338 U.S. 950 (1950) and enunciated as recently as United States ex rel. Jones v. Vincent, ___ F.2d ___ (2d Cir. 1974, Slip Op. p. 1653 February 6, 1974) but see Point III, infra. Under these cases in order to establish the claim of ineffective counsel it must be shown that the representation was such as would "shock the conscience of the court and make the proceeding a farce and mockery of justice".

After a two day hearing in which the Court had an opportunity to hear and question Johnson's appellate counsel, the District Court found that Johnson's representation

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* See, United States v. Reincke, 383 F.2d 129 (2d Cir. 1967); Hendersen v. Cardwell, 426 F.2d 150, 153 (6th Cir. 1970); Fortner v. Balkom, 380 F.2d 816 (5th Cir. 1967); Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971); Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945); United States v. Hendy, 203 F.2d 407, 416-418 (3rd Cir.), cert denied, 346 U.S. 865 (1953); People v. McDowd, 447 P. 2d 97 (Col. 1968).

at the appellate level was inept, appalling and lamentable and in violation of Johnson's Sixth Amendment rights.*

The District Court's finding that appellate counsel was ineffective should be afforded great weight and not be disturbed. Rule 52, Federal Rules of Civil Procedure. The function of this Court in reviewing the granting of habeas corpus relief is limited to determining whether the District Court had properly applied the controlling legal

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* "I therefore find myself compelled to conclude that the ineptitude displayed by petitioner's assigned appellate counsel did indeed deprive him of the effective assistance of counsel, in violation of his Sixth Amendment rights.

* * * * *

"Some consideration of the Wight 'shock the conscience' test is perhaps in order at this juncture. I am, in all candor, appalled that the representation of a convicted murderer, facing a minimum of fifteen years in prison, should be entrusted to a lawyer whose acquaintance with criminal law is so slight as to be non-existent. Petitioner's claim comes at a time when the Chief Justice of the United States[14] and the Chief Judge of our circuit[15] and that of the District of Columbia[16] have drawn our attention to the problem of ineffective representation. The Chief Justice in particular has stressed the need for specialized training in trial and appellate advocacy. The assigned appellate counsel, competent though he may be in his chosen field of the law, was lamentably equipped to handle petitioner's case. If we continue to assume that all lawyers are omni-competent generalists, our criminal courts will doubtless see more such 'farces and mockeries of justice' as this". [Footnotes omitted] (58a, 59a)

standards and to determine whether or not its factual findings were clearly erroneous. United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1098 (2d Cir. 1972); United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir.), cert denied, 410 U.S. 917 (1972); United States ex rel. Fitzgerald v. LaVallee, 461 F.2d 601 (2d Cir.), cert denied, 409 U.S. 885 (1972). Since the well known legal standard was correctly applied to the undisputed facts, as found by the District Court, the Court's findings cannot and are not even arguably said to be "clearly erroneous". Indeed, appellant's brief implicitly concedes Johnson's appellate counsel was incompetent.

The State takes the position that even if the District Court was correct in its finding that the representation in question was incompetent, Johnson was not prejudiced thereby. The State, with apparent seriousness urges first, that Johnson's trial counsel did not in fact request a charge of the lesser included offense of assault. Second, the State claims that even if trial counsel's request is found to be for such a charge, it would have been error as a matter of state law for the trial court to so charge. (Appellant's brief p. 9). Both positions are without merit.

The trial record (PX-3) reveals that Johnson's trial counsel did request a charge of assault and excepted

when the Court declined.* While the State, in an effort to exalt form over substance, contends no such charge was requested, the District Court found as a fact (which should not be disturbed absent a showing it was "clearly erroneous") as follows:

> "A fair reading of the colloquy between court and counsel, set out in the margin [see footnote this page], suggests that [Johnson's trial counsel] did request a charge of assault, and that the court declined this request because it felt that the crime of assault 'merged' into that of murder." (52a)

Trial counsel's strategy and argument in summation was to persuade the jury that Johnson may well have committed the crime of assault but he never intended to commit murder (T. 536, 538). That was the reason she requested the charge of assault hoping (assuming little or no reasonable expectation of an acquittal) that the jury would find Johnson guilty of the lesser included offense of assault but not guilty of murder. The trial court's refusal to so charge went to the heart of Johnson's defense.

New York law could hardly be clearer that assault is a "lesser included offense" within the crime of homicide.

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* The portion of the record relied upon by the District Court is set forth verbatim on page 61a and 62a note 5 of the appendix. See also 12a-16a.

New York Criminal Procedure Law Section 1.20 defines the term as follows:

> "When it is impossible to commit a particular crime without concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is with respect to the former, a 'lesser included offense'".

While it is difficult, if not impossible, to imagine a murder without a concomitant assault, based on the indictment in this case, the jury could easily have found an intent to commit assault in the first, second or third degree* by Johnson but no intent to murder in view of the beating administered in the apartment and the testimony that Johnson participated in dragging Chambers toward the roof in an unconscious state. There is no way to determine what the jury found as the fact. They could have concluded the beating in the apartment was the cause of Chambers' death and that he was dead before he fell from the roof in spite of Thompson's testimony. They could have concluded Chambers died while being dragged up the stairs or he died from the fall. In each of the three possible alternatives, had the jury been properly instructed, they could have acquitted Johnson of murder and convicted on assault. Specific

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* New York Penal Code, §§120.00, 120.05, 120.10

provision is made for such cases in the New York Code of Criminal Procedure §444.* See also People v. Zielinski, 247 App.Div. 573, 288 N.Y.S. 176 (4th Dep't 1936); People v. Cox, 67 App.Div. 344, 73 N.Y.S. 774 (3rd Dep't 1901).

People v. Mussenden, 308 N.Y. 558 (1955), contains the standard formulation of the doctrine of lesser included offenses. Judge Fuld, speaking for the Court of Appeals, stated the doctrine in the following manner:

> "It has been repeatedly written that if, upon any view of the facts, a defendant could properly be found guilty of a lesser degree or an included crime, the trial judge must submit such lower offense .... And it does not matter how strongly the evidence points to guilt of the crime charged in the indictment, or how unreasonable it would be, as a court may appraise the weight of the evidence, to acquit of that crime and convict of the less serious." 308 N.Y. at 562.

Indeed, the New York Court of Appeals has gone so far as to hold that "the conditions are exceptional" where a "refusal to instruct the jury as to their power to convict of a lower degree" is warranted. People v. Malave, 21 N.Y.2d 26 (1967); People v. Schleiman, 197 N.Y. 383 (1910); People v. Richardson, 36 A.D.2d 25 (4th Dep't 1971).

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* "Upon a trial for murder or manslaughter, if the act complained of is not proven to be the cause of death, the defendant may be convicted of assault in any degree constituted by said act, and warranted by the evidence."

§444 is now §300.50 of the New York Criminal Procedure Law, which is referred to on page 11 of the State's brief, which was not effective until September 1, 1971 and, therefore, not the law at the Johnson trial.

Given the indictment in this case, the facts proved at trial, trial counsel's rejected request for an instruction on assault and the New York statutory and case law, the District Court in holding that the trial judge was in error, stated:

> "The facts developed at the trial most assuredly support a jury finding of the crime of assault, and petitioner was thus entitled to such an instruction." (52a)

See People v. Battle, 22 N.Y.2d 323 (1968); People v. Richardson, 36 A.D. 2d 25 (4th Dep't 1971); People v. Usher, 39 A.D.2d 459 (4th Dep't 1972).

The four cases cited by the State on page 12 of its brief all pre-date Mussenden and People v. Zielinski, supra; one pre-dates §444 of the New York Code of Criminal Procedure, and all pre-date the modern statutory definition of assault, e.g., Section 120.10(3) New York Penal Law and the modern statutory definition of lesser included offense (Criminal Procedure Law §1.20(37)).*

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* People v. Miller, 143 App.Div. 215, 128 N.Y.S. 549, 553 (1st Dep't), aff'd 202 N.Y. 618 (1911), cited by the State, explains all these cases by focusing on the contents of the indictment. Citing Dedieu v. People, 22 N.Y. 178 (1860), the court held that a defendant may be convicted of a crime which is "necessarily included in the acts stated in the indictment as constituting the crime with which he is charged therein". The indictment here charged Johnson with acting in concert with others to bring about the death of Chambers on December 14, 1968. Since there was evidence that Johnson beat and dragged Chambers toward the roof all of his conduct fits within the terms of the indictment but

(Footnote continued on following page)

In spite of petitioner's clear showing of grave and obvious prejudice and the District Court's finding that "the petitioner would almost certainly have succeeded in obtaining a reversal of his conviction had it not been for his lawyer's misfeasance" (58a-59a), appellant claims Johnson failed to meet his burden. Thus, this case is readily distinguishable from this Court's opinion in United States ex rel. Testamark v. Vincent, ____ F.2d ____ (2d Cir. 1974), Slip Op. p. 3350, May 8, 1974, wherein Judge Moore stated at page 3358:

> "The most 'liberal' standard presently being applied by the federal courts in these matters states that to obtain relief a petitioner must show that 'there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense either in the District Court or on appeal.' Bruce v. United States, 379 F.2d 113, 116-17 (D. C. Cir. 1967). Testamark has never suggested that any defense was paralyzed or even impaired by counsel's alleged lack of competence." [Emphasis added.]

Attempting to distinguish this Court's decision in United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2d Cir.

(Footnote continued from preceding page)
the jury could have found intent only to assault not murder.

Thus, Miller explains not only Dedieu but People v. Wheeler, 79 App.Div. 396 (4th Dep't 1903), cited by the State, in that the defendant was charged with manslaughter and was convicted negligence -- a crime with different elements, uncharged in the indictment and not a lesser included offense under the indictment and the proof. In the other case cited in appellant's brief, People v. DeGarmo, 73 App. Div. 46 (4th Dep't 1902), the evidence showed the defendant struck the victim with a poker which caused her death. There was no factual basis for a charge of lesser included offense. Either the defendant did or did not strike the fatal blows. Thus, DeGarmo fits comfortably with Mussenden.

1967) upon which the Court below placed considerable reliance, appellant submits that in order for the Court in the instant case to assess the prejudice to petitioner, it would have "to analyze technical issues of state law or to speculate about the prospects for success in the state courts" (brief of appellant at p. 13). Appellant argues that in the absence of "readily identifiable" prejudice which it contends was present in Maselli but not in the instant case, petitioner's assertion of ineffective counsel must fail. This formulation of the degree of prejudice required is directly contrary to the law as articulated by the Supreme Court.

In Glasser v. United States, 315 U.S. 60 (1942), the Court specifically declined to strictly scrutnize the exact amount of prejudice to a defendant resulting from a court order to his attorney to represent potentially conflicting interests holding that

> "To determine the precise degree of prejudice...is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U.S. at 75.

Accordingly, some courts have held that the burden is on the state to show lack of prejudice, and "in the absence of

affirmative proof of lack of prejudice," resulting from inadequate counsel, a writ must issue e.g., Coles v. Peyton, 389 F.2d 224, 226-27 (4th Cir. 1968), while others have held that once a defendant established a "prima facie case of denial of effective assistance of counsel," the burden of proving prejudice or lack thereof shifts to the state. Rastrom v. Robbins, 319 F.Supp. 1090 (D. Me. 1970).

Moreover, the better view seems to be that "harmless error" tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel." Beasley v. United States, 491 F.2d 687 (6th Cir. 1974), citing Glasser v. United States, supra, at 315 U.S. 76 and Chapman v. California, 386 U.S. 18, 23, 43 (1967). See also, Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971) ("We cannot agree that where the basis of relief is...denial of the effective assistance of counsel that a showing of some chance of success is a prerequisite to habeas corpus relief").* Indeed, the facts of the Lumpkin case were closely analagous to the case at bar;

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* Cf. Walker v. Wainwright, 390 U.S. 335 (1968). Rybarik v. Maroney, 406 F.2d 1055, appeal after remand 435 F.2d 1292 (3d. Cir. 1969).

the state argued that the effective denial to petitioner of his appeal was harmless error inasmuch as any appeal would be "unmeritorious"; the Court rejected this contention.*

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* The statement on page 13 of appellant's brief and the authority offered in support thereof that a defendant cannot be convicted of a crime which occurred at another time and in another place is wholly inapposite. The crime Johnson was convicted of occurred in one place (i.e., the apartment house) at a specific time. Only a few minutes elapsed from the victim's beating to his death.

POINT II

JOHNSON HAS FULLY EXHAUSTED HIS STATE COURT REMEDIES AS REQUIRED BY TITLE 28, UNITED STATES CODE SECTION 2254

Appellant contends that Johnson has failed to exhaust his state court remedies in that the issues contained in his petition were never "fairly presented to the state courts". This claim is frivolous.

The State did not contend in the District Court that Johnson had failed to exhaust his state remedies. Failure to voice this contention below is a bar to its consideration on appeal. West v. Louisiana, 478 F.2d 1026, 1034 (5th Cir. 1973); United States ex rel. Springle v. Follette, 435 F.2d 1380 (2d Cir.) cert denied, 401 U.S. 980 (1970); United States ex rel. Ross v. LaVallee, 341 F.2d 823 (2d Cir.) cert denied, 382 U.S. 867 (1965); United States ex rel. Krzywosz v. Wilkins, 336 F.2d 509 (2d Cir. 1964); Jellum v. Cupp, 475 F.2d 829 (9th Cir. 1973); Parker v. Comstock, 404 F.2d 746 (9th Cir. 1968); Zekelkeyzula v. Patterson, 373 F.2d 522 (10th Cir. 1967).

In any event, Johnson has fully complied with 28 U.S.C. §2254(b). The State concedes the District Court at the very least, implicitly found that Johnson exhausted his state remedies (appellant's brief p. 14). Indeed, the District Court

explicitly found that Johnson's pro se motion of August 1972 for a new trial was "based on substantially the same grounds asserted in the instant petition" (46a). That motion was denied by Justice Fein who stated:

> "If appellate counsel's alleged oversight is intended as a claim of inadequate representation, such conduct occurred at the appellate level and not during the course of the proceedings in the nisi prius court". (25a)

The same Appellate Division to which the State urges Johnson ought to petition for leave to reargue his direct appeal, refused to leave to appeal Justice Fein's order (46a). He was thereafter informed that there was no provision in the law for appeal to the New York Court of Appeals. (Petition page 2).

The State claims Johnson's pro se motion did not raise the issue of incompetent appellate counsel. Such a contention is flatly refuted by the record.* A fair reading of Johnson's pro se motion indicates this issue was directly and precisely placed before Justice Fein and the Appellate Division which refused to permit an appeal. As this Court stated in United States ex rel. Leeson v. Damon, ___ F.2d (2d Cir., Slip Op. p. 2483, April 1, 1974) at 2487:

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* Justice Fein's opinion states in part:

> "He now claims error in that (1) the trial judge refused to charge assault as a lesser included count, although requested to do so by trial counsel, and (2) appellate counsel failed to raise the issue on the appeal." (25a)

> "All that is required by Picard v. Connor, 404 U.S. 270, 276 (1971), is that the state courts must have had a "fair opportunity" to consider a constitutional claim before federal habeas corpus is available under the exhaustion doctrine."

Here, not only did the Supreme Court and the Appellate Division have such an opportunity, the record is clear that the issue was in fact considered and rejected by both courts. On review, the Appellate Division has the duty of reviewing the record in determining whether errors had been preserved so as to warrant reversal "upon the facts" or "in the interests of justice". See N.Y.C.P.L. §470.15; United States ex rel. Leeson v. Damon, supra at 2487. Indeed, under N.Y.C.P.L. §470.50 upon the very same grounds, the Appellate Division could "upon its own motion" have granted a new appeal to Johnson but declined to do so when this very issue was squarely before it.

Moreover, the requirement of exhaustion of state remedies is not a jurisdictional prerequisite. Indeed, the requirement may be waived when circumstances require it. West v. Louisiana, supra at 1034.

After having failed to press the issue below, the State urges this Court to dismiss the writ and send Johnson back to the state courts which have grieviously harmed him by refusing to properly instruct the jury which convicted him on an obvious point of law, by appointing an appellate counsel

who has been found to be "lamentably equipped to handle" his case (59a), by a second Supreme Court Justice who denied his pro se post conviction motion on the same grounds offered here. Johnson had to wait for two years to have his direct appeal heard; he has had to wait almost a year and one-half to have his petition determined. He has been incarcerated on this case alone for five and one-half years since his arrest in December 1968 when he was a teenager. The State would have this case returned to the Appellate Division to "seek leave" to reargue his direct appeal "upon good cause shown". Should leave be denied as it has been before, Johnson would be required to file a new petition in federal court with the attendant time consuming delays. The instant petition was filed in the District Court on February 2, 1973, sixteen months ago! Not only would such a procedure serve no useful purpose, Johnson would be severly prejudiced thereby.

POINT III

THE "FARCE AND MOCKERY" STANDARD FOR REVERSAL OF A CONVICTION ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE ABANDONED BY THIS CIRCUIT AS IT HAS BEEN BY THE THIRD, FIFTH, SIXTH AND D. C. CIRCUITS

As demonstrated in Point I, supra, and as decided by the District Court, the handling of petitioner's appeal was so "manifestly inadequate" as to meet what Judge Bauman described as the "prevailing standard in this Circuit" for reversal of a conviction on the basis of ineffective assistance of counsel, "[a] lack of effective assistance of counsel...of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice" citing United States v. Wight, 176 F.2d 376 (2d Cir. 1949), cert denied, 338 U.S. 950 (1950).

Since the District Court found the handling of petitioner's appeal to be so manifestly inadequate as to meet the "farce and mockery/shock the conscience" test, a fortiori any more lenient standard has been met. Accordingly, the latter standard is presented merely for the convenience of the Court should this Court deem it relevant, and petitioner in no way concedes that the handling of this case on appeal was in any way adequate under any standard, however demanding.

While it is generally true that this Circuit has uniformly adhered to the stringent standard, see United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972), the Courts of Appeals of four other circuits have declared that the "farce and mockery" test should be abandoned in favor of a somewhat more lenient and meaningful standard. Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970); Bruce v. United States, 379 F.2d 113, 116 (D. C. Cir. 1967). Indeed, the present standard in this Circuit is somewhat questionable since, in a very recent decision, this Circuit seems to have acknowledged without specifically adopting the District of Columbia standard. United States ex rel. Testamark v. Vincent, (No. 663, May 8, 1974). In addition, the highest courts of several states have abandoned the "farce and mockery" standard,* and numerous

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* E.g., State v. Thomas, 15 Crim. L. Rep. 2026 (W.Va. Sup. Ct. 1974) ("normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law"); State v. White, 5 Wash. App. 283, 487 F.2d 243 (1971), rev'd, 81 Wash. 2d 223, 500 P.2d 1242 (1972); State v. Anderson, 117 N.J. Super. 507, 519, 287 A.2d 234, 240 (App.Div. 1971). In re Saunders, 2 Cal. 3d 1033, 1041, 472 F.2d 921, 926, 88 Cal. Rptr. 633, 638 (1970) ("counsel reasonably likely to render and rendering reasonably effective assistance").

commentators have urged its abandonment and the adoption of a more meaningful standard.*

Those courts which have abandoned the "farce and mockery" standard have articulated a number of reasons, the most important of which are the inadequacy of the "farce and mockery" standard to vindicate defendants' Sixth Amendment rights, the practical need for more objective criteria than the highly conclusory "farce and mockery" formulation, and the increasing recognition within the legal profession that criminal defense work is a specialized skill which requires specific training and experience.

As to the first reason, it has long been recognized that the Sixth Amendment guarantee that a criminal defendant shall enjoy the right "to have the assistance of counsel for

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* E.g., Finer, "Ineffective Assistance of Counsel", 58 Cornell L. Rev. 1077 (1973) (test suggested: "whether counsel exhibited the normal and customary degree of skill possessed by attorneys who are fairly skilled in the criminal law and who have a fair amount of experience at the criminal bar." Id. at 1080); Bines, "Remedying Ineffective Representation in Criminal Cases, Departures from Habeas Corpus", 59 Va. L. Rev. 927 (1973); Waltz, "Inadequacy of Trial Defense Representation as a Ground of Post-conviction Relief in Criminal Cases", 59 N.W.U. L. Rev. 289 (1964); Craig, "The Right to Adequate Representation in the Criminal Process: Some Observations", 22 S.W. L. J. 260 (1968); Note, "Effective Assistance of Counsel for the Indigent Defendant", 78 Harv. L. Rev. 1434 (1965).

his defense"* requires the effective assistance of counsel, and that the requirement "cannot be satisfied by mere formal appointment". Avery v. Alabama, 308 U.S. 444, 446(1940).**

In abandoning the "farce and mockery" standard, the D.C. and Sixth Circuits both recognized that the standard had its origins in the mistaken notion that the Sixth Amendment provides for no more than formal appointment of counsel, and that an ineffective assistance claim could, therefore, be grounded solely on the Fifth Amendment.*** The latter notion was expressly rejected by the D.C. Circuit in Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970):****

> "The 'farce and mockery' standard derives from some older doctrine on the content of the due process clause of the Fifth Amendment...
>
> "That standard is no longer valid as such but exists in the law only as a metaphor that the defendant has a heavy burden to show requisite unfairness..
>
> "What is involved here is the Sixth Amendment. The Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment as is clear from other contexts. Compare, for example, United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L.Ed.2d 1149 (1967) with Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L.Ed.2d 1199 (1967)."

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* See also, Gideon v. Wainwright, 372 U.S. 335 (1963), holding the Sixth Amendment guarantee to be a fundamental provision of the Bill of Rights made obligatory upon the states by the Fourteenth Amendment and Johnson v. United States, 352 U.S. 565 (1957), holding that the right to counsel extends to appellate proceedings.

** See also, McMann v. Richardson, 397 U.S. 759, 771 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955).

*** See, Bruce v. United States, 379 F.2d 113 (D.C.Cir. 1967) and Scott v. United States, 427 F.2d 609 (D.C.Cir. 1970), overruling Diggs v. Welch, 148 F.2d 667 (1945); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

**** See also, Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

Viewed in this context, it is clear that the "farce and mockery" standard is a "conclusory description"* which is simply inadequate to assess the performance of counsel, and that more objective criteria are needed. Indeed, the court below in the instant case also found that the "farce and mockery" standard "provides little or no assistance in evaluating concrete cases". (55a)

It is submitted that the test adopted by the Fifth and Sixth Circuits is the most appropriate one upon which to base the evaluation of a claim of ineffective assistance of counsel:

> "...the assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance."**

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* Beasley v. United States, 491 F.2d at 692.

** Beasley v. United States, 491 F.2d at 696. The Court continued,

> "...It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence...Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations... Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner...Harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel."

See also, West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973). The standard adopted by the D.C. Circuit is somewhat different, articulated as "whether gross incompetence blotted out the essence of a substantial defense." Bruce v. United States, 379 F.2d 113, 116-17 (D.C. Cir. 1967). Various commentators have suggested still other formulations. Of course, the handling of petitioner's case on appeal was so inadequate as to satisfy any conceivable standard.

Finally, the importance of this issue is underscored by the increasing attention it has commanded recently. Besides the numerous courts and commentators who have dealt with it, prominent members of the judiciary have individually expressed concern with the frequency of inadequate criminal defense representation and its adverse impact both on criminal defendants and our system of criminal justice. Thus, Chief Judge Kaufman has pointed out that the criminal defense function is a specialized one, and has suggested that consideration be giver to the adoption of a rule requiring demonstrated competence in trial or appellate advocacy as a prerequisite to admission to the bar in certain courts.* And Chief Justice Burger has spoken publicly of the "need for skilled courtroom advocacy" and a system of certification for trial advocates.**

For all of the foregoing reasons, this Court may deem it appropriate to reassess the outdated and irrelevant "farce and mockery" standard and to adopt a more meaningful measure of the effectiveness of counsel.***

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* Kaufman, "The Court Needs a Friend in Court", 60 ABA J. 175 (1974). See also, United States v. Weiss, 491 F.2d 460, 469 (2d Cir. 1974); United States v. Chatman, 15 Crim. L. Rep. 2157 (D.C. Superior Ct. May 7, 1974); Cf. Tollett v. Henderson, 93 S.Ct. 1602, 1608 (1973)(referring to the value of "specialized knowledge" of defense counsel).

** Burger, "The Special Skills of Advocacy", the Fourth John F. Sonnett Memorial Lecture, in 42 Fordham L. Rev. 227 (1973).

***The issue raised in Johnson's petition relating to the material required to be produced by the prosecutor pursuant to Brady v. Maryland, 373 U.S. 83 (1963) is not abandoned. Petitioner relies on the contents of his petition as well as the testimony of Ford and the prosecutor at the hearing to sustain his contention that he should be granted a new trial.

CONCLUSION

The District Court's order should be affirmed.

Respectfully submitted,

JOHN J. TIGUE, JR.
Attorney for Appellee

ELIZABETH B. DUBOIS
MARK C. MORRIL
(Legal Action Center of the City of New York)
of Counsel

STATE OF NEW YORK, COUNTY OF NEW YORK ss:

JOHN J. TIGUE, JR. being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 12 Hillside Road, Larchmont, New York

Check Applicable Box

[X] Affidavit of Service By Mail — On May 31 1974 deponent served the within BRIEF OF PETITIONER-APPELLEE upon Louis J. Lefkowitz attorney(X) for Respondent-Appellant in this action, at 2 World Trade Center, New York, N.Y. the address designated by said attorney(X) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in ~~XXXXXXXX~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

[ ] Affidavit of Personal Service — On 1974 at deponent served the within upon herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me on May 31 1974

Mary Ann Bosko

MARY ANN BOSKO
Notary Public, State of New York
No. 31-5297105
Qualified in New York County
Commission Expires March 30, 1976

The name signed must be printed beneath

JOHN J. TIGUE, JR.